Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NO..... 79-1393

HOWARD COURTWRIGHT; SAM CUTRELL; RICHARD CYR; JIM DOYLE; CARL GUSTAFSON; GENE HINES; TERRY HUCKINS; DON PETERS; ROGER PIERCE; ELDON RHODES; JOE RIELLY; JON SCROGGINS; DENNIS SMITH; WAYNE STALLSWORTH; GENE TUGGLE; PAUL ULLERICH; and FRED WOOLSEY,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; SAFEWAY STORES, INC.; DENVER RETAIL GROCERS & RETAIL CLERKS UNION LOCAL NO. 7, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL NO. 634; THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION NO. 1; DELIVERY DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 435; MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNION NO. 537; and WAREHOUSE AND DISTRIBUTION EMPLOYEES UNION, LOCAL UNION NO. 452,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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HOWARD COURTWRIGHT; SAM CUTRELL; RICHARD CYR; JIM DOYLE; CARL GUSTAFSON; GENE HINES; TERRY HUCKINS; DON PETERS; ROGER PIERCE; ELDON RHODES; JOE RIELLY; JON SCROGGINS; DENNIS SMITH; WAYNE STALLSWORTH; GENE TUGGLE; PAUL ULLERICH; and FRED WOLLSEY,

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; SAFEWAY STORES, INC.; DENVER RETAIL GROCERS & RETAIL CLERKS UNION LOCAL NO. 7, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL NO. 634; THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION NO. 1; DELIVERY DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 435; MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNION NO. 537; and WAREHOUSE AND DISTRIBUTION EMPLOYEES UNION, LOCAL UNION NO. 452,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully pray that this Honorable Court issue its writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit and represent the following:

1. THE JUDGMENT SOUGHT TO BE REVIEWED

A copy of the judgment sought to be reviewed is attached as an appendix to this petition. Petitioners are unaware that the opinion has, as yet, been officially reported. It has been unofficially reported at 21 EPD (CCH) para. 30, 456.

2. JURISDICTIONAL BASES

The judgment of the Court of Appeals was rendered on December 5, 1979. No petition for rehearing was filed with that Court. The provisions of **Title 28, United States Code, §1254** grant jurisdiction to this Court to review that judgment.

3. THE QUESTION PRESENTED

In Petitioners' view, the question presented by their petition is:

Whether the decision of this Court in **International Brotherhood of Teamsters v. United States,** 431 U.S. 324 (1977), requires a United States District Court, having entered a consent decree modifying, and partially abrogating, a seniority system established by collective bargaining, to vacate, pro tanto, the provisions of such decree upon the petition of employees adversely affected thereby.

4. STATUTES INVOLVED

The following provisions of Title VII of the Civil Rights Act of 1964 (P.L. 88-352, Title VII, 78 Stat. 252, et seq.; as amended by P.L. 92-261, Title VII, 86 Stat. 103, et seq.; 42 U.S.C. §2000e, et seq.) are here involved:

> **Section 703(h)** — "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system, ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin ..." (42 U.S.C. §2000e-2(h)).

> **Section 706(g)** — "If the [district] court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate ..." (42 U.S.C. §2000e-5(g)).

5. STATEMENT OF THE CASE

In 1976 the Equal Employment Opportunity Commission ("EEOC") commenced an action against Safeway Stores, Inc. ("Safeway"), pursuant to the authority granted to it by Section 706(f) (1) and (3) and (g) of Title VII of the above referenced Act (42 U.S.C. §2000e-5(f) (1) and (3) and (g)), asserting that Safeway was engaging in unfair employment practices in its various facilities located in Denver, Colorado. Joined as parties, pursuant to the provisions of Rule 19(a) (2), Federal Rules of Civil Procedure, were several labor organizations which represented various Safeway employees in separate collective bargaining units, including Local 435, affiliated with the International Brotherhood of Teamsters ("Local 435").

At the time of the commencement of this action, a collective bargaining agreement between Safeway and Local 435 provided that the competitive seniority of each employee within Local 435's unit was to be determined by such employee's length of service within the bargaining unit — no credit was given for any employment by Safeway in positions outside this unit.

Petitioners are a group of Safeway employees who, prior to the commencement of the instant litigation, had transferred from other jobs with Safeway into the Local 435 unit. All are white males, except one, who is a black male. Each of them, upon his transfer into the Local 435 unit, "forfeited" his previously accumulated seniority, in accordance with the contractual seniority system. None of them were made parties to the litigation, nor was any formal notice of its pendency given to them.

In September, 1976, the EEOC and Safeway, joined by all the labor organizations which had been made parties to the action, entered into a stipulated consent decree, with approval of the district court, which was designed to dispose of the litigation. This decree contained extensive provisions relating to various subjects. Among those provisions were two relating to the seniority of Safeway employees.

Paragraph I.C.6 of the decree defined seniority as "the length of continuous employment **with the Company** ..." (emphasis supplied).

Paragraph VIII.C provided that:

> "... when a [job] vacancy occurs, an employee may transfer laterally to another job classification within the same facility in which he or she is employed for which he or she is qualified or qualifiable without loss of seniority."

In implementing the terms of this decree, Safeway originally interpreted them to require it to grant to all of its employees competitive seniority rights, for purposes of job bidding, layoffs and recalls, based upon each employee's length of service within any bargaining unit. Accordingly, it originally "restored" to Petitioners the seniority "lost" by them when they previously transferred into the Local 435 unit.

When Local 435 learned of Safeway's actions, however, it sought a clarification of the decree's terms with the result that the district court determined that:

> "The Decree mandates that the seniority of all employees who have transferred from one job or facility to another **since the effective dates of the Decree** is to be computed for all purposes (including bidding for trucking runs) on a "Company-wide basis."" (emphasis supplied).

and

> "An employee retains his/her seniority after a transfer ... provided such transfer occurred **after the effective date of the Decree.**" (emphasis supplied).

Under the decree, as thus interpreted, the **contractual** seniority system continued to apply to all employees (both majority and minority) who had transferred into the Local 435 unit **before** the decree, but **company-wide** seniority was granted to all employees (both majority and minority) who transferred **after** the decree was entered.

Between the date of the decree's entry and the date of the court's clarifying order, seven employees transferred into the Local 435 unit and were granted seniority based upon their total length of service with Safeway. Of these seven, all were males; five were white; one was black; and one was Spanish-surnamed.[1]

Shortly after the entry of the clarifying order, when it became apparent that Local 435 was not, and could not, adequately represent Petitioners' interests,[2] Petitioners sought, and were allowed, to intervene in the action. They asserted, essentially, that the decree's provisions respecting seniority were not framed to accomplish any legitimate purpose under the Act. Such provisions, they asserted, were being utilized by senior white male employees to gain enhanced seniority rights to the detriment of junior minority employees. They alleged, therefore, that the decree's pertinent provisions should be amended so as to make them applicable to all employees, rather than distinguishing between employees based solely upon the artificial and fortuitous event of the date the decree was signed, or, in the alternative, to apply them only to minority employees, under the presumption that only such employees would have been affected by any past unfair employment practices.

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[1]The district court held no evidentiary hearing upon the issues raised by Petitioners and, consequently, made no findings of fact. Various parties filed affidavits with that court, some of which were factually inconsistent, one with another, although not substantially so.

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[2]Petitioners do not assert that Local 435 violated its obligations owed to them under the standards adopted in *Vaca v. Sipes*, 361 U.S. 171 (1967). The fact that they concede that Local 435 exercised good faith, however, does not amount to a concession that Local 435 was an adequate judicial representative for them. Note Appendix, at page 4, n. 2.

Before Petitioners' motion was entirely disposed of by the district court, this Court announced its opinion in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), which held, inter alia, that the proviso to Section 703(h) of the Act prohibited judicial abrogation of a seniority system established by collective bargaining, absent evidence that its adoption was motivated by unlawful intent.

In light of the *Teamsters* decision, both Petitioners and two of the defendant labor organizations suggested to the district court that a modification in the decree was dictated, so as to remove therefrom the blanket grant of company-wide seniority to all post-decree transferees and so as to substitute therefor provisions which established a procedure for recognition of the seniority rights of any minority member improperly denied job transfers in the past. See *Teamsters, supra*, and *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

Although requested by several parties to do so, the district court held no evidentiary hearing upon the issues raised. Rather, after considering various joint submissions by the parties, that court merely entered a minute order denying Petitioners' and two labor organizations', motions to modify.[3]

Petitioners instituted an appeal to the Court of Appeals. While that appeal was pending, however, all parties petitioned the district court to amend the decree by deleting therefrom on a prospective basis, the seniority transfer provisions contained therein. Such joint request was granted. The court-ordered seniority system, therefore, was in effect for approximately 18 months.

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[3]Petitioners' original motion was filed in April, 1977, some seven months after the decree's entry and 30 days after the district court's clarifying order was entered. In July, 1977, the district court provisionally denied Petitioners' motion, but directed the parties to present further factual materials to it. This was done in November, 1977, at which time requests were made for an evidentiary hearing. The court's minute order was entered on January 12, 1978, approximately nine months after the Petitioners' original motion was filed.

6. ARGUMENT

In affirming the district court's denial of relief to Petitioners, the Tenth Circuit acknowledged that the decree granted "enhanced" seniority rights to post-decree transferees, "many of whom had no more cláim to Title VII protection than [Petitioners]." (App., p. 4). Likewise, that Court recognized that, had the consent decree been entered subsequent to the announcement of the *Teamsters* opinion, a legitimate issue respecting the decree's propriety might have been presented. (Id., p. 10).

Nevertheless, it affirmed the district court's refusal to modify the decree on three principal bases, as follows:

a. That relief from a final equitable decree under Rule 60(b), Federal Rules of Civil Procedure, cannot take the form of retroactive alteration of that decree;

b. That *Teamsters* did not require a different conclusion;

and

c. That, in any event, there was no proof presented to the trial court that Local 435's contractual seniority system was "bona fide" within the meaning of the Section 703(h) proviso.

In reaching these conclusions, however, the Court of Appeals failed to take cognizance of the vital distinctions between the factual circumstances presented by this case and those involved in the adjudications relied upon by it. Those distinctions consist of the following:

a. Petitioners here were not made parties to the original litigation; they received no formal notice of the same; and they took no part in preparing the consent decree. They admit, of course, that, in the "typical" lawsuit, it may well be presumed that an employee's collective bargaining agent will provide adequate representation to him. Here, however, because of Local 435's necessary representation of two or more groups of employees with conflicting interests, Local 435 could not adequately represent all those interests. Indeed, after the decree's entry, that

labor organization made claims, and took positions, diametrically opposed to Petitioners' interests. Thus, in allowing Petitioners to intervene at the trial level, the district court made a specific finding that "their interest is not adequately represented by the existing parties in this suit."

This being the factual predicate, there exists reasonable grounds for believing that the district court's decree, as well as its later clarifying order, was not "final," at least under the traditional concepts of "res judicata," in any sense binding upon Petitioners. *Sam Fox Publishing Co. v. United States,* 366 U.S. 683 (1961). See, also, *Acha v. Beame,* 570 F.2d 57 (2d Cir., 1978), approving the vacation of a summary judgment, certified as final under *Rule 54(b),* after this Court's pronouncement in *Teamsters, supra,* was published. Given these circumstances, the strictures upon modification of an equitable decree, contained within *Rule 60(b)* or otherwise, cannot be applied.

Furthermore, even if it be conceded, arguendo, that only a prospective modification of the decree is authorized, surely such a modification could be effective from the date of the filing of Petitioners' motion with the district court — a date nearly one year prior to the date that the decree was actually modified.

b. The Court of Appeals grounded its opinion, in part, upon its conclusion that Petitioners had failed to show sufficiently changed conditions to warrant a modification in the decree's terms (App., p. 9). Yet, both Petitioners and the other parties to the litigation were given no opportunity to present such evidence, since the district court failed to grant their requests for an evidentiary hearing. Likewise, the Court of Appeals refused to remand the matter to the lower court for this purpose.

c. While the language of Section 703(h) does not, literally, impose any limitation upon a federal court's authority, that provision, read in conjunction with the Act's grant of jurisdiction to the federal judiciary to enjoin intentional violations of the Act (42 U.S.C. §2000e-5(g)), constitutes a positive proscription upon the relief to be granted under Title VII. In a substantive sense, this restraint is similar to the restraint against injunctions in actions

involving "labor disputes," which is to be found within the provisions of the Norris-La Guardia Act (29 U.S.C. §104). Thus considered, the *Teamsters* decision involved not merely a matter of substantive law, but it established parameters for the exercise of a federal court's subject matter jurisdiction. If this be an accurate analysis, that portion of the decree which purported to affect the contractual seniority system was beyond the power of the trial court to adopt.

d. The Court of Appeals noted that there had been no determination made that the contractual seniority system was "bona fide" under Section 703(h). However, the EEOC made no assertion that it was not "bona fide" in its complaint (filed prior to *Teamsters*), nor did any party so contend. On the contrary, Local 435 explicitly contended below that, had it been aware of the *Teamsters'* principle at the time, it would not have joined in approving the consent decree. Finally, all parties agreed to, and the trial court approved of, a return to the contractual seniority system approximately 18 months after the decree's entry. Surely, if the EEOC had any questions with respect to the system's bona fides, it could not have consented to its reinstitution.

7. CONCLUSION

Petitioners assert that the decision of the Court of Appeals in this case failed to give to this Court's decision in *Teamsters, supra,* the effect which this Court intended. As a result, its decision is, we submit, inconsistent with the basic tenets of that decision. This Court should grant its writ of certiorari to review the judgment of the Court of Appeals for the purpose of re-emphasizing the attention which the federal courts must pay to the Congressionally-approved proviso to Section 703(h) of the Act.

Respectfully submitted,

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APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

vs.

SAFEWAY STORES, INC.; DENVER RETAIL GROCERS & RETAIL CLERKS UNION LOCAL NO. 7; AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL NO. 634; THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION NO. 1; DELIVERY DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 435; MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNION NO. 537; and WAREHOUSE AND DISTRIBUTION EMPLOYEES UNION, LOCAL UNION NO. 452,

Defendants-Appellees,

No. 78-1138

vs.

HOWARD COURTWRIGHT; SAM CUTRELL; RICHARD CYR; JIM DOYLE; CARL GUSTAFSON; GENE HINES; TERRY HUCKINS; DON PETERS; ROGER PIERCE; ELDON RHODES; JOE RIELLY; JON SCROGGINS; DENNIS SMITH; WAYNE STALLSWORTH; GENE TUGGLE; PAUL ULLERICH; and FRED WOOLSEY,

Intervenors-Appellants.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. Case No. 75-F-1184)

John A. Criswell of Criswell & Patterson, Englewood, Colorado, for Intervenors-Appellants.

Martin D. Buckley of Hornbein, MacDonald & Fattor, Denver, Colorado, for Defendant-Appellee Delivery Drivers, Warehousemen and Helpers, Local Union No. 435.

Gregory A. Eurich (with Richard W. Comfort on the brief) of Holland & Hart, Denver, Colorado, for Defendant-Appellee Safeway Stores.

Marilyn S.G. Urwitz (with Abner W. Sibal, General Counsel; Joseph T. Eddins, Associate General Counsel; and Beatrice Rosenberg, Assistant General Counsel, on the brief), Washington, D.C., for Plaintiff-Appellee Equal Employment Opportunity Commission.

Walter Brauer (with Thomas B. Buescher on the brief) of Brauer & Simons, Denver, Colorado, for Defendant-Appellee Amalgamated Meat Cutters and Butcher Workmen of North America Local No. 634.

Before SETH, Chief Judge, McWILLIAMS and McKAY, Circuit Judges.

McKAY, Circuit Judge.

This action was instituted by the Equal Employment Opportunity Commission (EEOC) pursuant to §706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-5(f), (g), alleging unfair employment practices by Safeway Stores, Inc. After the filing of initial pleadings, EEOC, Safeway and the various labor unions made up of Safeway employees joined as defendants pursuant to Fed. R. Civ. P. 19(a) (2) entered into a

lengthy consent decree. Among other things, the decree provided for a change in the calculation of seniority upon transfer from one Safeway labor unit to another: "[W]hen a vacancy occurs, an employee may transfer laterally to another job classification ... for which he or she is qualified or qualifiable without loss of seniority. Selection of applicants for transfer shall be based upon seniority with the Company." Record, vol. 1, at 28, para. VIII.C. "Seniority" is defined in the decree as "the length of continuous employment with the Company computed from the date the employee first reports for work" in any Safeway labor unit (company seniority). Record, vol. 1, at 17, para. I-C-6. In contrast, the various collective bargaining agreement with Safeway provided that seniority would be measured by the length of an employee's service "within the bargaining unit" (unit seniority). Supplemental Record at 31. Therefore, the decree modified the existing seniority system to allow transfers between job classifications, and therefore between bargaining units, without the loss of seniority accrued since the original date of hire with Safeway.

Safeway initially construed the consent decree to grant company seniority to all of its employees. One of the involved unions, Delivery Drivers, Warehousemen and Helpers, Local Union No. 435, petitioned the district court to enjoin Safeway from acting on this interpretation, and Safeway requested clarification of the decree regarding the seniority provisions. In response, the district court entered an "Order Interpreting the Consent Decree and Granting Injunctive Relief." In pertinent part, that order determined: "The Decree mandates that the seniority of all employees who have transferred from one job ... to another **since the effective date of the Decree** is to be computed for all purposes ... on a company-wide basis." Record, vol. 1, at 171 (emphasis added).

Shortly after the entry of this order, 17 individual members of Local 435 were allowed to intervene in the suit. The intervenors had transferred from another Safeway job into Local 435 prior to the date of the consent decree and, under the court's interpretation of the decree, they would not be credited with company

seniority. Accordingly, their seniority status was adversely affected by the enhanced seniority of post-decree transferees, many of whom had no more claim to Title VII protection than intervenors.[1] In a motion for modification, intervenors insisted that either all employees be accorded company seniority or that only minority members retain seniority advantages upon transfer.[2]

In denying the intervenors' motion, the district court indicated that it would be willing to modify the decree only upon a strong showing:

> (1) that the goals of the Decree would be substantially furthered by such a modification, or (2) that the harm to [the intervenors] outweighs (a) the benefits to minority employees from prospective application of the transfer provisions of the Decree, and (b) any harm that may result from retroactive application of these provisions.

Record, vol. 1, at 181. In addition, the court ordered the parties to meet in an attempt to agree on a modification. When the parties failed to agree or to convince the court of a compelling need for modification, intervenors' further motion for modification was denied, forming the basis of this appeal.

While this appeal was pending, all parties stipulated to certain amendments of the original consent decree. Pursuant to this stipulation, the right to retain company seniority upon transfer terminated on July 1, 1978, approximately a year and a half after the entry of the decree. Those who transferred after the date of the decree but before this amendment became effective retained company seniority.

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[1] One of the intervenors is black and, as of the last available data, two of the post-decree transferees into Local 435 were Spanish-surnamed. All others are white males. Apparently, not all of the intervenors were in fact disadvantaged in the seniority system by transfers under the decree. The evidence on both the numbers and makeup of affected intervenors and protected transferees is grossly incomplete, but resolution of these specifics is not necessary to the conclusion we reach.

[2] Intervenors do not contend that their interests were not fairly represented by Local 435 in the negotiation of the consent decree. *See* Brief for Intervenor-Appellants at 29 n.10. *See also* Bolden v. Pennsylvania State Police, 578 F.2d 912, 918 (3d Cir. 1978).

I.

We consider preliminarily whether the district court erred in interpreting the language of the consent decree to afford company seniority only to post-decree transferees. It is clear that the enforcing court has power to interpret a decree when its language results in confusion. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 438 (1976). *Ridley v. Phillips Petroleum Co.*, 427 F.2d 19 (10th Cir. 1970), demonstrates the breadth of a court's discretion in constructing decrees. We held there that a court should adopt an interpretation which renders the judgment "more reasonable, effective, and conclusive." *Id.* at 23 (quoting *Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co.*, 137 F.2d 871 (6th Cir. 1943), *cert. denied*, 320 U.S. 800 (1944)).

The district court's interpretation of the seniority provisions of this consent decree was reasonable in light of the language and purpose of the decree.[3] The interpretation thus become *pari materia* with the decree for purposes of this opinion.

II.

There are two channels through which a consent decree may later be modified.[4] Rule 60(b) allows for relief from a final judgment, order or proceeding upon a showing that "the judgment is void," that "it is no longer equitable that the judgment should have prospective application," or for "any other reason justifying relief." Fed. R. Civ. P. 60(b) (4), (5), (6). In addition, a court of equity has continuing jurisdiction to modify a decree upon changed circumstances, even if the decree was entered by consent. *United States v. Swift & Co.*, 286 U.S. 106 (1932). However, a court's power to modify is not to be lightly exercised to change the settled terms of a consent decree. An appellate court must be particularly reluctant to alter a decree because the entering court has broad discretion in the administration of such decrees. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763-64 (1976); *EEOC v. American Telephone & Telegraph Co.*, 556 F.2d 167, 178 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 850 (5th Cir. 1975) *cert. denied*, 425 U.S. 944 (1976); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085-86 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). A trial court's ruling on a Rule 60(b) motion will not be disturbed by this court absent an abuse of discretion. *Winfield Associates, Inc. v. Stonecipher*, 429 F.2d 1087, 1090 (10th Cir. 1970).

Intervenors' first objection to the decree is that a grant of enhanced seniority rights to all post-decree transferees rather than to all employees or to minority transferees only does not fulfill any legitimate purpose of Title VII. We agree that the purpose of Title VII is to secure relief to members of a class — those who may be subject to employment discrimination "on the basis of race, color, religion, sex, or national origin."[5] 42 U.S.C. §2000e-2. But to argue that the terms of a consent decree may not vary from the statutory limits of Title VII[6] is to misconceive the nature of consent decrees and to ignore the strong policy embodied in Title VII in favor of voluntary settlements.[7]. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). Of course, the statute

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[3]Even if the interpretation of the district court is viewed as a substantive change in the intention expressed by the original decree rather than a mere clarification, such an interpretation is within the court's power under the very doctrines the intervenors seek to have us apply in this appeal.

[4]The intervenors do not suggest the procedural approach upon which they rely.

[5]Title VII actions can be brought for the benefit of a potential class of discriminatees rather than for merely those who can prove they were actually victims of discrimination. *See* United States v. Navajo Freight Lines, 525 F.2d 1318, 1324-26 (9th Cir. 1975).

[6]Some victims of discrimination within the target of Title VII may not be readily identified — *i.e.*, those hampered in employment opportunities by their religious affiliation or national origin. Consequently, we are unable to detect from intervenors' figures how many of the post-decree transferees were actually within the literal scope of Title VII. Some broadening of apparent class limits may be necessary to reach all those affected.

[7]At the core of this consent decree is an agreement between Safeway and the unions reached in an attempt to comply with Title VII. Some comparison can be made to a collective bargaining agreement which, according to the Supreme Court, "may go further, enhancing the seniority status of certain employees for the purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement." Franks v. Bowman Transportation Co., 424 U.S. 747, 778-79 (1976) (citing Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)).

may provide the broad outlines of the objectives to be reached and the mechanisms to be used. This court would not countenance governmental coercion in directions wholly outside the purview of congressional pronouncement under the aegis of consent decree negotiations.

It is not the purpose of Rule 60(b) or the inherent powers of chancery to allow the modification of a consent decree merely because it reaches a result which could not have been forced on the parties through litigation. For example, in *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220 (10th Cir. 1979), this court upheld a consent decree against a Rule 60(b) (4) attack. The appellant claimed that the relief afforded by the consent decree was in violation of federal patent law and was therefore void. This court responded to that "[e]ven if the parties' consent decree does technically run afoul of federal patent law principles, the problem would be relief from an erroneous judgment, not a void one." *Id.* at 226. We held that Rule 60(b) (4) "is not available to correct mere legal error." *Id. See also Mayberry v. Maroney*, 558 F.2d 1159, 1164 (3d Cir. 1977). In *United States v. Swift & Co.*, 286 U.S. 106 (1932), the Supreme Court held that an "injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making." *Id.* at 119. The fact that a consent decree exceeds the law by prohibiting lawful conduct, *Swift & Co. v. United States*, 276 U.S. 311, 328-31 (1928), or by granting an unauthorized remedy, *Walling v. Miller*, 138 F.2d 629 (8th Cir. 1943), *cert. denied*, 321 U.S. 784 (1944), does not render it void. Such efforts may be grounds for reversal on appeal of the judgment, but they are not grounds for collateral attack.

Although a consent decree will not be vacated merely because it is legally erroneous, it may be altered upon a showing of changed circumstances which have produced "hardship so extreme and unexpected" as to make the decree oppressive. *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932); *S.E.C. v. San-Dal Oil & Gas, Inc.*, 433 F.2d 304, 305 (10th Cir. 1970); *Ridley v. Phillips Petroleum Co.*, 427 F.2d 19,22 (10th Cir. 1970). We find no abuse of discretion in the district court's determination that this decree

was not rendered inequitable by changed circumstances. There is no evidence indicating that the facts — *e.g.*, the nature and makeup of Safeway employees and operations — against which the decree and the interpreting order were framed have substantially changed.

Intervenors assert an additional ground for impeaching the consent decree. They argue that *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), decided after the decree and interpretive order were entered, compels modification. In interpreting §703(h) of Title VII, the Supreme Court in *Teamsters* held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." *Id.* at 353-54. We are not obliged to decide for this appeal what impact *Teamsters* would have on a consent decree reached after *Teamsters* was decided or on the outcome of subsequent litigation between these parties. We decide only that *Teamsters* does not require retroactive alteration of the consent decree in this case.

A similar situation was presented in *Collins v. City of Wichita*, 254 F.2d 837 (10th Cir. 1958). After the original judgment in *Collins* became final, the Supreme Court reviewed, in another case, the statute upon which the judgment was based and found it unconstitutional. In denying a Rule 60(b) motion based on the subsequent Supreme Court decision, this court held, "A change in the law or in the judicial view of an established rule of law" is not an extraordinary circumstance justifying relief. *Id.* at 839. The Third Circuit confronted a similar change in the case law on a Rule 60(b) motion in *Mayberry v. Maroney*, 558 F.2d 1159 (3d Cir. 1977). It concluded that the power to alter decrees "does not contemplate relief based merely on precedential evolution." *Id.* at 1164. *See also Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940).

There are some situations where a change in the law warrants modification of an injunctive decree. For instances, in *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), the Supreme Court balanced the policies of finality and flexibility and determined that an amendment of the statute underlying an

earlier decree made prospective enforcement of the decree inequitable. However, it was the prospective injunctive effect of the decree at issue in *System Federation*. The Court did not purport to erase retroactively the effect of the decree.

Other cases have held that a significant judicial clarification of the law will justify altering the future application of a decree in compelling circumstances. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976); *City & County of Denver v. Denver Tramway Corp.*, 187 F.2d 410, 417 (10th Cir. 1951); *Coca-Cola Co. v. Standard Bottling Co.*, 138 F.2d 788 (10th Cir. 1943). No attempt was made in these cases to undo the effects of past enforcement.[8] In contrast, intervenors seek only the unraveling of seniority already assigned to employees who transferred in reliance to the decree. Because the decree has now been amended to delete the transfer provisions, future application of the decree is no longer in issue.

There is one additional reason why *Teamsters* does not compel our alteration of the seniority provisions of this decree. *Teamsters* prohibits abrogation of a seniority system only if that system is bona fide.[9] Because this case was never litigated, there has been no determination that Safeway's seniority system is bona fide. Intervenors would have us assume at this point the system was bona fide, or at the least, remand the case for a hearing and determination. This we decline to do. The policy of voluntary settlement so important to the enforcement of Title VII would be seriously undermined if the approving court were required to establish the facts underlying the parties' positions before approving a consent decree. The power to compromise exists

[8] *Spangler* differs from the instant case in one other significant way. In *Spangler* the Supreme Court decision which cast doubt on the propriety of continued enforcement of the consent decree as interpreted was decided after the entry of the original decree but before the offending interpretation. The question in *Spangler*, therefore, was not whether a subsequent case requires modification of an interpretive order already made final.

[9] In Acha v. Beame, 438 F. Supp. 70 (S.D.N.Y. 1977), *aff'd*, 570 F.2d (2d Cir. 1978), for instance, the court determined that *Teamsters* required Rule 60(b) relief from an injunction when, during the course of the litigation which produced the injunction, it had been determined that the seniority system involved was "facially neutral ... and followed the ... dictates of" state law. 438 F. Supp. at 73.

partially because of the uncertainties and expense typical of adversary hearing and judicial determination of fact. *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085-86 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). We concur with the district court, "A Consent Decree would be worthless if it could be attacked on the ground that had the Court made a particular determination, such relief would then not be statutorily available." Record, vol. 2, at 213.

We are unconvinced that the intervenors should obtain the extraordinary relief they request. The district court did not abuse its discretion in administering the decree.

AFFIRMED.

Supreme Court, U. S.
FILED
APR 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-1393

In the Supreme Court of the United States

OCTOBER TERM, 1979

HOWARD COURTWRIGHT, ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10-19) is reported at 611 F. 2d 795. The orders of the district court (App. 1a-6a, *infra*) are not reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1979. No petition for rehearing was filed. On March 1, 1980, Mr. Justice White granted an extension until March 10, 1980, in which to file the petition for a

---

[1]Petitioners did not reproduce the district court's orders granting petitioners' motion to intervene and denying their motion to modify the decree. For the Court's convenience we have reproduced them as an appendix to this brief.

writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in failing to vacate a provision of a consent decree that temporarily modified existing seniority privileges in a collective bargaining agreement, where the consent decree had been approved by all parties to the agreement, including petitioners' union, and where the modification was neither illegal nor a breach of the union's duty of fair representation.

STATEMENT

In 1975 the Equal Employment Opportunity Commission filed this employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The complaint alleged that Safeway Stores, Inc., had maintained terms and conditions of employment adversely affecting blacks and Spanish-surnamed Americans at its Denver facility. The collective bargaining representatives for Safeway's employees, including Local Union 435, Delivery Drivers, Warehousemen, and Helpers, were named defendants under Rule 19(a)(2), Fed. R. Civ. P. (Pet. App. 11).

The EEOC, Safeway, and all of the unions, including Local 435, entered into a consent decree, and it was approved by the district court in September 1976 (Pet. App. 11-12). To encourage minority transfers into previously "white" bargaining units, one provision of the consent decree provided that employees who transferred laterally to a job classification in a new bargaining unit would do so with company seniority, *i.e.*, seniority credit

calculated from the date of original hire by Safeway in Denver. The provision altered the existing Safeway-Local 435 collective bargaining agreement, which provided for unit seniority, *i.e.*, seniority credit calculated from the date of hire or transfer into the bargaining unit (Pet. App. 12).

Safeway initially interpreted the consent decree to apply retroactively. It gave all of its employees company seniority irrespective of when they transferred to new bargaining units. In March 1977, after Local 435 moved to enjoin Safeway's application of that interpretation, the district court construed the decree as having only a prospective application (Pet. App. 12). The consent decree therefore required the award of company seniority only to employees who transferred to new units after entry of the decree.

Petitioners, a group of 17 Safeway employees (one of whom is black) who had transferred into the Local 435 unit from other Safeway jobs prior to the entry of the consent decree, moved to intervene. They asked the district court to reconsider its order and modify the decree either to provide retroactive company seniority for all employees or to limit the prospective seniority relief to minority transferees (Pet. App. 13). The district court permitted intervention for the limited purpose of challenging the prospective application of the consent decree, but it refused to modify the decree (*ibid.*; App. A, *infra*). The district court held that the prospective application of the decree effectuated the intent of the parties to encourage minority transfers; it further held that the retroactive application would not (App. A, *infra*, 3a-4a).

Seven months later, petitioners, this time joined by the union, again moved to modify the decree. The district court again declined to do so (Pet. App. 13; App. B, *infra*). Petitioners and the unions appealed this decision. During the pendency of the appeal all parties, including petitioners, filed a motion in the district court to amend the consent decree to provide for the termination of the modified seniority provision on July 1, 1979. The district court granted this motion (Pet. App. 13). The unions dismissed their appeals but petitioners did not.

On petitioners' appeal, the court of appeals held that the district court had not abused its discretion in its interpretation, administration, and termination of the seniority provisions (Pet. App. 14, 19). The court of appeals found the district court's clarifying interpretation of the seniority modification provision to be reasonable and to effectuate the intent of the parties. The court took note of *Teamsters* v. *United States*, 431 U.S. 324 (1977), in which this Court held that a bona fide seniority system does not become unlawful simply because it may perpetuate pre-Title VII discrimination, but it observed that *Teamsters* was decided after the consent decree in this case had been consummated (Pet. App. 17-18). The court concluded, citing *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 778-779 (1976), that the limits on the specific prohibitions of Title VII did not mandate any further modification of the consent decree because the decree was analogous to a collective bargaining agreement and therefore could go beyond the requirements of Title VII in advancing public policy interests (Pet. App. 15 & n.7).

ARGUMENT

The decision of the court of appeals properly applies established principles of law to the facts of this case. Further review is therefore unwarranted.

1. As the court of appeals recognized, the modification of the seniority system was arrived at by voluntary negotiations between all parties to the collective bargaining agreement in an effort to comply with the requirements of Title VII (Pet. App. 15 & n. 7). The court relied on this Court's holding that collective bargaining agreements may legitimately "enhanc[e] the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement." *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 778-779 (citing *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953)). See also *United Steelworkers* v. *Weber*, 443 U.S. 193, 201-204 (1979); *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 62 (1975). Inasmuch as petitioners acknowledge that Local 435 met its duty of fair representation (Pet. 5, n.2), its negotiation of the collective bargaining agreement modification embodied in the consent decree was well within its power. See also *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967).

2. Moreover, petitioners do not claim that the prospective seniority modification itself was illegal, *i.e.*, that it discriminated on racial grounds. Their quarrel with the change is that some whites who transferred *after* the decree received benefits denied to whites (and all others)

who transferred *before* the decree. However, as this Court made clear in *Ford Motor Co.* v. *Huffman*, *supra*, 345 U.S. at 338:

> A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals. * * * Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.

Inasmuch as the change in the collective bargaining agreement violates no federal law, the courts below properly approved the modification of the collective bargaining agreement by its signatories.

3. Although petitioners contend that the district court should have held an evidentiary hearing on their claim that the seniority modification was per se grossly oppressive, or made so by changed conditions, they have failed to assert any hardship except for the fact that pre-decree transferees were treated differently from post-decree transferees. The district court and the court of appeals reasonably concluded that this difference did not cause extreme or oppressive hardship (Pet. App. 16-17). Their refusal to alter the consent decree was therefore not an abuse of discretion. See *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

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APRIL 1980

DOJ-1980-04

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-F-1184

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

SAFEWAY STORES, INC., et al.,

Defendants.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
MAY 16, 1977

ORDER GRANTING PETITION TO INTERVENE, ORDERING A MEETING ON PETITIONERS' MOTION TO MODIFY THE CONSENT DECREE, AND, IF NECESSARY, ORDERING STATEMENTS OF POSITION AND BRIEFS

This matter arises on a Petition for Intervention by 17 individuals, filed on April 22, 1977, together with Alternative Motions for Relief from our Order interpreting the Consent Decree, entered on March 22, 1977, Reconsideration of that Order, and Modification of the Consent Decree. We have also considered the 17 applicants' Statement of Position in support of their Petition for Intervention and of their several alternative motions, and a lengthy affidavit filed by one of these applicants. We grant the Petition for Intervention for the limited purpose of challenging the prospective nature of

the provisions of the Consent Decree which mandate company-wide seniority for transferees. The intervenors' motion for relief from our Order and Reconsideration of our Order are denied. Their motion for Modification of the Consent Decree is held in abeyance, pending discussion amongst the parties and further briefing of this issue.

I.

Rule 24(a) permits intervention

> . . .(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Petitioners currently work in Defendant Safeway's Trucking Department, and are now represented by Defendant Local 435. Our Order of March 22, 1977 at Part III held that seniority for employees who transfer from one job facility to another must be computed on a company-wide basis from the effective date of the Decree. The effect of the prospective terms of the Decree is to reduce Petitioners' seniority by comparison with the seniority of those who transferred into Local 435 after the effective date of the Decree.

Petitioners' interest in obtaining company-wide seniority is clearly related to the terms of the Consent Decree, which is the remedy agreed upon by the parties and ordered by the Court in this case. In the absence of a challenge to the terms (or our interpretation thereof) of the Decree dealing with company-wide seniority,

Petitioners' ability to protect their claimed interest in company-wide seniority would be impeded. Moreover, their interest is not adequately represented by the existing parties in this suit. Prior to our Order of March 22, *supra*, it had been the position of Local 435, to which Petitioners belong, that only minority employees should be permitted company-wide seniority for purposes of transfer. Finally, Petitioners' application for intervention was timely filed. Although the terms of the transfer provisions of the Decree are clearly prospective, it was not until our Order of March 22 that the disputed effect of these terms was finally resolved. Indeed, Petitioners allege that Defendant Safeway had informed them prior to our interpretation of the Decree that the seniority of all transferees into Local 435 would be computed on a company-wide basis, regardless of the date of their transfer. Petitioners filed their application within one month of receiving our Order. There has been no response to Petitioners' application, and we find no substantial prejudice to the other parties in this action as a result of their intervention. Accordingly, Petitioners may intervene pursuant to Rule 24(a)(2).

II.

As noted above, the terms of the lateral transfer provisions in Paragraphs IV and VIII.C. of the Consent Decree are prospective, and our Order of March 22 found that they could only be so interpreted. The purpose of permitting seniority to be computed on a company-wide basis with respect to transfers is to encourage minorities to transfer into departments where they have been underrepresented. Under a system of company-wide seniority, transferees will not lose any seniority upon transfer into another bargaining unit. The collective bargaining agreement between Local 435 and Safeway

provides for bargaining unit seniority. *See* Petitioners' Statement of Position at 4. The Decree was not intended to modify the provisions of the collective bargaining agreements among the parties, except where specifically contradicting them. *See* Decree at Para. I.E.; Order of March 22, 1977 at 4. An interpretation of the Decree that would compel company-wide seniority on a retroactive basis would modify seniority clauses in collective bargaining agreements that had been in effect for years before the Decree.*

III.

Only a modification of the terms of the Consent Decree could give Petitioners company-wide seniority. It may be that Petitioners will suffer to some degree by virtue of the prospective nature of the provisions of the Consent Decree that deal with the computation of seniority. However, the Court is not willing to apply the Decree restroactively until strong showing is made that the goals of the Decree would be substantially furthered by such a modification, or (2) that the harm to Petitioners outweighs (a) the benefits to minority employees from prospective application of the transfer provisions of the Decree, and (b) any harm that may result from retroactive application of these provisions.

---

*At the time Petitioners transferred into Local 435, the Consent Decree was not in effect. The only provisions governing their seniority were to be found in Local 435's bargaining agreement with Safeway, which provided for bargaining unit seniority. The transferees, therefore, had every expectation at that time that they would be credited only with bargaining unit seniority. The effect of the Decree is only to modify the method of computing for those employees who transfer after its effective date, and thereby to encourage transfers. Retroactive application of the Decree would not encourage transfers.

IV.

Accordingly, it is hereby Ordered that the Petition to Intervene, filed on April 22, 1977, is GRANTED for the limited purpose of challenging the prospective nature of the provisions of the Consent Decree mandating company-wide seniority for transferees.

It is further Ordered that Petitioners' Motion for Reconsideration of our Order of March 22, 1977, which interpreted the Decree, is GRANTED. We have reconsidered, and we reaffirm, that Order. The Decree clearly mandates prospective application of company-wide seniority for transferees. Accordingly, Petitioners' Motion for Relief from our Order is DENIED.

It is further Ordered that counsel for all the parties and intervenors meet by May 27, 1977 in an effort to resolve the issue raised by Petitioners. The Court directs that the results of such meeting be reported to the Court by June 3, 1977.

It is further Ordered that, in the absence of an agreement among the parties to amend the Decree, succinct statements of position or in opposition to Petitioners' Motion to Modify the Consent Decree be filed by all the parties by June 9, 1977. Petitioners will have until June 16, 1977 to file a brief reply. The Court will endeavor to rule without oral argument, if possible, on the Motion to Modify the Decree, which is the only outstanding motion in this case.

DATED at Denver, Colorado, this 16 day of May, 1977.

BY THE COURT:

/s/ SHERMAN G. FINESILVER

SHERMAN G. FINESILVER, Judge
United States District Court

APPENDIX B

JUDGE SHERMAN G. FINESILVER

DATE: January 12, 1977 [1978]

E. E. O. C.,

Plaintiff,

ACTION No. 75-F-1184

M I N U T E O R D E R

vs.

SAFEWAY STORES, INCORPORATED, et al.,

Defendants.

The Intervenors' Motion to Modify Decree, filed with the Court on November 23, 1977, is denied.

Copies of the foregoing Minute Order were duly mailed to the persons herein listed.

Martin Buckley, Esq. 1600 Broadway, Suite 1900 Denver, Co. 80202	Edward Scheunemann, Esq. 340 St. Paul St., Suite 300 Denver, Co. 80206
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JAMES R. MANSPEAKER, Clerk

By: _____

Supreme Court, U.S.
FILED
APR 11 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1393

HOWARD COURTWRIGHT; SAM CUTRELL; RICHARD CYR; JIM DOYLE; CARL GUSTAFSON; GENE HINES; TERRY HUCKINS; DON PETERS; ROGER PIERCE; ELDON RHODES; JOE RIELLY; JON SCROGGINS; DENNIS SMITH; WAYNE STALLSWORTH; GENE TUGGLE; PAUL ULLERICH; and FRED WOOLSEY,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; SAFEWAY STORES, INCORPORATED; RETAIL CLERKS UNION, LOCAL NO. 7; AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL NO. 634; THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 1; DELIVERY DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 435; MILK DRIVERS AND DAIRY EMPLOYEES LOCAL NO. 537; WAREHOUSE AND DISTRIBUTION EMPLOYEES UNION, LOCAL NO. 452; BAKERY WAGON DRIVERS AND SALESMEN'S LOCAL UNION NO. 219; and DISTRICT LODGE NO. 86, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT SAFEWAY STORES, INCORPORATED, IN OPPOSITION

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In the
Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1393

HOWARD COURTWRIGHT; SAM CUTRELL; RICHARD CYR; JIM DOYLE; CARL GUSTAFSON; GENE HINES; TERRY HUCKINS; DON PETERS; ROGER PIERCE; ELDON RHODES; JOE RIELLY; JON SCROGGINS; DENNIS SMITH; WAYNE STALLSWORTH; GENE TUGGLE; PAUL ULLERICH; and FRED WOOLSEY,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; SAFEWAY STORES, INCORPORATED; RETAIL CLERKS UNION, LOCAL NO. 7; AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL NO. 634; THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 1; DELIVERY DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 435; MILK DRIVERS AND DAIRY EMPLOYEES LOCAL NO. 537; WAREHOUSE AND DISTRIBUTION EMPLOYEES UNION, LOCAL NO. 452; BAKERY WAGON DRIVERS AND SALESMEN'S LOCAL UNION NO. 219; and DISTRICT LODGE NO. 86, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT SAFEWAY STORES, INCORPORATED, IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Petition, Appendix at 10-19), has been officially reported at 611 F.2d 795.

JURISDICTION

The opinion of the Court of Appeals unanimously affirming the trial court was entered on December 5, 1979. Petitioners did not seek rehearing, but seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Was the unanimous decision of the Court below correct when it found no abuse of discretion in the trial court's rulings denying Petitioners' prayer for a declaration that the transfer provision was void *ab initio* where the trial court entered a decree by consent of all the parties pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* ("Title VII"), which, for the purpose of encouraging the movement of employees who may have been discriminatorily assigned to less desirable jobs, permitted employees of Respondent Safeway Stores, Incorporated ("Safeway") to transfer between bargaining units with a carry-over of accumulated seniority, thereby superceding provisions of various collective bargaining agreements to the contrary, and where the transfer provision was subsequently deleted by consent of all the parties and resulted in minimal impact upon the Petitioners (Intervenors below) during the 18 months within which it was in effect?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

In addition to the provisions of Title VII cited in the Petition, also applicable herein is Federal Rules of Civil Procedure, Rule 60(b)(5) and (6), which provides in pertinent part as follows:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .

> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment."

ADDITIONAL STATEMENT OF THE CASE

Safeway believes that the operative facts are fairly summarized by the opinion of the Court of Appeals (Petition, Appendix at 11-13).

Of particular importance to whether this Court should grant the writ sought is the fact that the transfer provision, designed to further Title VII goals by encouraging the movement of employees who may have been discriminatorily assigned to less desirable jobs, was part of a decree entered by consent of the parties. There thus was no adjudication that Safeway's seniority system was "bona fide," entitling it to the protection of Section 703(h) of Title VII.

Further, the transfer provision was in effect for only approximately 18 months, at which time it was deleted from the decree, again by consent of all the parties. During those 18 months, six or seven employees transferred into the truck driver bargaining unit, which consisted of approximately 275 employees and of which Petitioners are members. Because none of the transferees had a company seniority date earlier than September 19, 1972, a substantial majority of the Petitioners were senior to them and were unaffected by such transfers. Only five of the transferees were senior to any of the Petitioners, and of those five, two are members of minority groups. The transfer provision, accordingly, had only minimal effect on the seniority of the bargaining unit as a whole and upon the rights of the Petitioners in particular.

It is based upon the facts recited in its opinion and these facts that the Court of Appeals unanimously affirmed the rulings of the trial court, entered in the exercise of its sound discretion pursuant to Rule 60(b), in declining to delete or modify the transfer provision until it was deleted by consent of the parties.

REASONS WHY THE WRIT SHOULD BE DENIED

The decision of the Court of Appeals was correct and was in accord with the decisions of this Court and the courts of appeals. It is apparent from the Petition that the basis for Petitioners' claim is their dispute with the trial court concerning its exercise of discretion in reviewing the final judgment. Such a dispute, confined so clearly to a unique set of facts concerning interpretation and application of a decree entered by consent, simply does not involve questions worthy of review by the grant of certiorari.

1. *The decision below does not conflict with decisions of this Court or the courts of appeals in reviewing trial court rulings under Rule 60(b).*

Petitioners do not now challenge the standards applied by the Court of Appeals in reviewing the trial court's rulings under Rule 60(b). Rather, for the first time they now claim, without supporting authority, that the decree and the trial court's later clarifying order are not "final" as to Petitioners, and that the "strictures" of Rule 60(b) do not apply to them. This assertion is based upon a claim that they are not bound by the consent to the transfer provision of their exclusive bargaining agent, Delivery Drivers, Warehousemen and Helpers, Local Union No. 435 ("Local 435"), because their seniority interests are in conflict with those of the majority of the bargaining unit.

The courts of appeals have recognized that finality of a decree would be unattainable were Petitioner's argument to be adopted, as the nature of a seniority system is such that conflicting interests always exist between various segments of a bargaining unit. In a decision of the Third Circuit Court of Appeals in a similar fact context, *Bolden v. Pennsylvania State Police,* 578 F.2d 912 (3d Cir. 1978), that court held "that a labor organization is an adequate representative of the interests of the majority of its members . . . and that insofar as its interests are not antagonistic to those of the majority of its members, the members are bound by the judgment." *Id* at 918. This decision was noted without disagreement by the Court of Appeals below (Petition, Appendix at 13). Safeway is aware of no contrary authority of this Court or of the courts of appeals. As a small minority of the membership of Local 435, the Petitioners are thus bound by the consent of Local 435 to the decree in general and to the transfer provision in particular.

Thus, the Court of Appeals correctly concluded that the trial court's ruling should not be disturbed on appeal absent a showing that the trial court abused its discretion under Rule 60(b). *S.E.C. v. Thermodynamics, Inc.* 464 F. 2d 457, 459 (10th Cir. 1972); *Winfield Associates, Inc. v. Stonecipher,* 429 F. 2d 1087, 1090 (10th Cir. 1970). This is especially so in the case of a consent decree, where the trial court has broad discretion in its administration. *Franks v. Bowman Transp. Co., Inc.,* 424 U.S. 474 (1976).

Before the Court of Appeals, the Intervenors had objected to the transfer provision in part by claiming that a grant of enhanced seniority rights to all post-decree transferees, rather than to all employees or to minority transferees only, did not fulfill a legitimate purpose of Title VII. In applying the standards of a court reviewing a trial court ruling under Rule 60(b), the Court of Appeals correctly observed that modification of a decree was not appropriate "merely because it reaches a result which could not have been forced on the parties through litigation." (Petition, Appendix at 16). As the Court of Appeals further stated:

> "The fact that a consent decree exceeds the law by prohibiting lawful conduct, *Swift & Co. v. United States,* 276 U.S. 311, 328-31 (1928), or by granting an unauthorized remedy, *Walling v. Miller,* 138 F.2d 629 (8th Cir. 1943), *cert. denied,* 321 U.S. 784 (1944), does not render it void. Such efforts may be grounds for reversal on appeal of the judgment, but they are not grounds for collateral attack." Id.

In asserting that they were not permitted to make an evidentiary showing of changed conditions warranting modification of the decree as required by this Court in *United States v. Swift & Co.,* 286 U.S. 106 (1932), Petitioners ignore the fact that the only changed conditions they have ever claimed is the announcement of this Court's opinion in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977). The Court of Appeals was clearly correct in deciding such a question of law without the need for an evidentiary hearing.

2. *The decision below does not conflict with decisions of this Court or the courts of appeals in approving decrees by consent which modify seniority systems.*

Finally, Petitioners argue that this Court's decision in *Teamsters v. U.S., supra,* in a fashion analogous to the provisions of the Norris-LaGuardia Act, 29 U.S.C. § 104, removed subject matter jurisdiction from the federal courts to modify seniority systems which, as here, are alleged to be "bona fide" under § 703(h) of Title VII. Petitioners cite no decisions of this Court or the courts of appeals for this analogy.

More importantly, they ignore a fundamental distinguishing policy of Title VII which is to encourage voluntary settlement. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974). The parties herein observed that policy by reaching agreement concerning, among many other things, the transfer provisions contained in the decree. Accordingly, no adjudication was made concerning the "bona fides" of the seniority system or its effect upon pre-Act or post-Act discriminatees. For the trial court to have adjudicated the "bona fides" of the seniority system would have undermined the major impetus of settlements, namely, to avoid the uncertainties and expense of litigation. *Florida Trailer & Equip. Co. v. Deal,* 284 F.2d 567 (5th Cir. 1960). It was in part on this basis that the Court of Appeals correctly found no conflict between this Court's decision in *Teamsters v. U.S., supra,* and the transfer provision of the decree.

There is no conflict between the courts of appeals on this issue. In *Airline Stewards and Stewardesses Ass'n., Local 550 v. American Airlines, Inc.,* 573 F.2d 960 (7th Cir. 1978), the Seventh Circuit Court of Appeals followed these principles in a case very similar to the instant case. There, the district court approved the settlement of a case brought pursuant to Title VII. The settlement agreement provided for reinstatement for discharged discriminatees of their accrued occupational seniority from the time of their discharge. The intervenor-union argued that *Teamsters v. U.S., supra,* required that the district court decide the merits of plaintiffs' claims prior to deciding whether the settlement agreement was appropriate. The district court declined to do so. The court of appeals agreed, stating:

> "While we believe that in a controverted Title VII case the issues raised by intervenor would be both difficult and interesting, we must recognize that we are here reviewing the propriety of a settlement and not a judgment rendered after a trial.
>
> * * *
>
> "It seems to us beyond serious dispute that no reasonable parties are going to settle any case if an intervenor can force them to litigate separately

> the merits of each claim. The rule urged by the intervenor would most seriously discourage efforts to settle Title VII cases, and we refuse to sanction such a result." *Id.* at 963-964.

Application of similar judicial analysis to the instant consent decree compelled the Court of Appeals below to rightfully agree with the district court's conclusion: "A Consent Decree would be worthless if it could be attacked on the ground that had the Court made a particular determination, such relief would then not be statutorily available." (Petition, Appendix at 19).

In the context of a consent decree, therefore, and given that the transfer provision is no longer in effect, the Court of Appeals' decision is not in conflict with the tenets annnounced in *Teamsters v. U.S., supra.*

CONCLUSION

The Court of Appeals held that the district court did not abuse its discretion in administrating the consent decree. A decision upholding the exercise of discretion by a district court is not grist for the granting of a petition for certiorari. Furthermore, the Court of Appeals' decision is based upon a consent decree as opposed to an adjudication on the merits. Therefore, the "bona fides" of the seniority system have never been judicially established. In this context, the Court of Appeals' decision does not conflict with this Court's decision in *Teamsters v. U.S., supra.* The petition for certiorari should be denied.

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